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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 RICHARD K. MCDONALD,)

8 Plaintiff,)

9 v.)

10 JO ANNE B. BARNHART,)
Commissioner of Social Security,)

11 Defendant.)
12 _____)

CASE NO. C05-1827-RSM-MJB

REPORT AND
RECOMMENDATION

13
14 Plaintiff Richard McDonald (“Plaintiff”) appeals to the District Court from a final
15 decision of the Commissioner of the Social Security Administration (the
16 “Commissioner”) denying his application for Disability Insurance Benefits (“DIB”) and
17 Supplemental Security Income (“SSI”) disability benefits under Titles II and Title XVI
18 of the Social Security Act. 42 U.S.C. §§ 401-33 (2003); 42 U.S.C. §§ 1381-83(f). For
19 the reasons set forth below, it is recommended that the Commissioner's decision be
20 REVERSED and REMANDED for further administrative proceedings.

21 I. PROCEDURAL HISTORY

22 Plaintiff filed his application for DIB and SSI on October 17, 2001, claiming that
23 he became disabled by May 31, 1999 (Tr. 119-21) because of injuries to his neck, knee,
24 and back, and because of his bipolar disorder (Tr. 147). Plaintiff's application was

1 denied initially (Tr. 44) and on reconsideration (Tr. 37-39). Plaintiff requested a hearing
2 with an Administrative Law Judge (“ALJ”) (Tr. 53), and on July 17, 2004, Plaintiff
3 testified and was represented by counsel in an administrative hearing before ALJ Nichols
4 (Tr. 594-628). A vocational expert (“VE”), Olof R. Elofson, also testified. (Tr. 620-26.)
5 The ALJ issued his decision finding Plaintiff not disabled on September 10, 2004. (Tr.
6 23-34.) The Appeals Council declined to review the ALJ’s decision on September 10,
7 2005 (Tr. 11-12), and the ALJ’s decision became the final decision of the
8 Commissioner. 20 C.F.R. § 404.984(b)(2). On November 3, 2005, Plaintiff filed his
9 appeal for review by this Court.

10 II. THE PARTIES’ POSITIONS

11 Plaintiff requests that the Court reverse the ALJ’s finding that Plaintiff is not
12 disabled and order payment of benefits or remand this case for further administrative
13 proceedings. Plaintiff argues that the ALJ erred in making his Residual Functional
14 Capacity (“RFC”) determination by improperly evaluating medical evidence, finding
15 Plaintiff not entirely credible, and rejecting statements from Plaintiff’s friend Ralinda
16 Morris. Plaintiff further contends that the ALJ erred in finding Plaintiff not disabled at
17 step five of the sequential evaluation process.

18 The Commissioner argues that the ALJ applied correct legal standards and cited
19 substantial evidence, and his finding that Plaintiff is not disabled should therefore be
20 affirmed.

21 III. STANDARD OF REVIEW

22 This Court may set aside the Commissioner’s denial of disability benefits when
23 an ALJ’s findings are based on legal error or are not supported by substantial evidence in
24 the record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial
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evidence is defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Rather than affirming the Commissioner's decision by isolating a specific quantum of supporting evidence, the Court must consider the record as a whole and weigh evidence that supports and evidence that detracts from the Commissioner's conclusion. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Where the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

IV. EVALUATING DISABILITY

Claimants bear the burden of proving that they are disabled. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 423 (d)(1)(A).

The Social Security regulations set out a five-step sequential evaluation process for determining whether claimants are disabled within the meaning of the Social Security Act. *See* 20 C.F.R. § 416.920. At step one, a claimant must establish that he or she is not engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, a claimant must establish that he or she has one or more medically severe impairments or combination of impairments. If a claimant does not have a "severe"

1 impairment, he or she is not disabled. *Id.* at § (c). At step three, the Commissioner will
2 determine whether the claimant's impairment meets or equals any of the listed
3 impairments described in the regulations. A claimant who meets one of the listings is
4 disabled. *See Id.* at § (d). If a claimant's impairments do not meet or equal a listing, the
5 Commissioner proceeds to step four.

6 At step four, the Commissioner evaluates the claimant's RFC and the physical
7 and mental demands of the claimant's past relevant work to determine whether the
8 claimant is able to perform his or her past relevant work. *Id.* at § (e). If a claimant is not
9 able to perform his or her past relevant work, the burden shifts to the Commissioner at
10 step five to show that the claimant can perform some other job that exists in significant
11 numbers in the national economy, taking into consideration the claimant's RFC, age,
12 education, and work experience. *Id.* at § (f); *Tackett*, 180 F.3d at 1100. If the
13 Commissioner finds that the claimant is unable to perform other work, then the claimant
14 is disabled.

15 V. SUMMARY OF THE RECORD EVIDENCE

16 Plaintiff was insured for disability under Title II of the Social Security Act
17 through May 31, 1999, the onset date of his alleged disability.¹ (Tr. 119.) Born in
18 November of 1970 (*Id.*), Plaintiff was 28 years old at the onset of his alleged disability
19 and 33 years when the ALJ issued his decision (Tr. 34). Plaintiff has a general
20 equivalency diploma ("GED") (Tr. 53) and has past relevant work as a telemarketer, a
21 construction laborer, a warehouse worker, and as a temporary laborer (Tr. 148).

22 Because the parties have adequately summarized the record in their briefing, and
23 because much of the record evidence is not relevant given the scope of the issues, the

24 ¹ There is no insured status requirement for Title XVI benefits.

1 Court will not summarize the record here. Relevant evidence will be referenced in the
2 discussion as necessary.

3 VI. THE ALJ'S DECISION

4 At step one, the ALJ found the Plaintiff was not engaged in substantial gainful
5 activity. (Tr. 33, Finding No. 2.) At step two, the ALJ found that Plaintiff's bipolar
6 disorder, history of alcohol dependency, personality disorder, and his injuries to both
7 knees and his back were severe impairments. (*Id.*, Finding No. 3.) At step three, the
8 ALJ found that Plaintiff's impairments did not meet or equal a listed impairment. *See* 20
9 C.F.R. Pt. 404, Subpt. P, App. 1; (Tr. 33, Finding No. 4). The ALJ determined that
10 Plaintiff retains an RFC that allows him to lift and carry 20 pounds occasionally and 10
11 pounds frequently, stand and sit for about six hours, walk for up to 30 minutes for about
12 four hours in an 8-hour workday. (*Id.*, Finding No. 6.) Additionally, the ALJ found that
13 Plaintiff's RFC restricts him from using foot controls, walking on rough ground, and
14 stooping frequently but that Plaintiff can occasionally climb, balance, kneel, crouch, and
15 crawl. (*Id.*) The ALJ found that Plaintiff was further limited in his ability to perform
16 repetitive pushing and pulling activities with his right arm; that he is limited to fairly
17 repetitive, structured work; and that his bipolar and personality impairments restricted
18 him to working alone without close proximity to coworkers or the public. (*Id.*) Finally,
19 the ALJ concluded that Plaintiff's RFC allowed him to perform a significant range of
20 light work. (Tr. 34, Finding No. 11); 20 C.F.R. §§ 404.1567 and 416.967.

21 At step four, the ALJ found that Plaintiff was unable to perform any of his past
22 relevant work (Tr. 34, Finding No. 7) and that he has no transferable skills from any past
23 relevant work or that transferability of skills is not an issue in this case. (*Id.*, Finding
24 No. 10). At step five, the ALJ found that Plaintiff could perform a significant number of

1 jobs in the national economy, specifically: table worker, laundry worker, and night
2 watchman. (*Id.*, Finding No. 12.)

3 VII. DISCUSSION

4 Plaintiff argues that because the ALJ improperly rejected medical and testimonial
5 evidence, the ALJ omitted significant limitations from his RFC finding. Specifically,
6 Plaintiff argues that the ALJ erred in evaluating the medical evidence, in dismissing
7 some of Plaintiff's alleged limitations by finding Plaintiff not entirely credible, and in
8 dismissing statements from his friend Ralinda Morris. The Commissioner responds that
9 the ALJ applied correct legal standards and cited substantial evidence in evaluating
10 medical evidence, Plaintiff's credibility, and lay testimony, and that the limitations
11 detailed in Plaintiff's RFC are therefore complete and accurate.

12 A. The ALJ's Rejection of Medical Evidence

13 Plaintiff argues that the ALJ improperly rejected some medical opinions and
14 evidence while erroneously relying on other opinions and evidence. The Commissioner
15 responds that the ALJ stated clear and convincing reasons supported by substantial
16 evidence in the record for rejecting some opinions and accepting others, or alternatively,
17 that if the ALJ erred his error was harmless.

18 Opinions from treating and examining physicians, if not contradicted by another
19 doctor, may be rejected only for "clear and convincing" reasons supported by substantial
20 evidence in the record. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If
21 contradicted by another doctor, the opinions of treating and examining physicians "can
22 only be rejected for specific and legitimate reasons that are supported by substantial
23 evidence." (*Id.* at 831.)

24 1. Dr. McConnell

1 Plaintiff argues that the ALJ should have accepted the opinion of Dr. Robert
2 McConnell, an examining orthopedic surgeon, that Plaintiff's knee impairments limited
3 him to sedentary work. (Tr. 346-47.) Plaintiff asserts that Dr. McConnell's opinion
4 deserves more weight because he is a specialist. 20 C.F.R. §§ 404.1527(d)(5),
5 416.927(d)(5); *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996). Instead, Plaintiff
6 argues that the ALJ did not address Dr. McConnell's opinion.

7 The Commissioner argues that the ALJ's oversight amounts to harmless error
8 because the table worker position cited by the ALJ at step five is a sedentary job. The
9 Commissioner also points out that the reviewing court must consider all of the record
10 evidence to determine whether it contains substantial evidence supporting the ALJ's
11 findings. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). No "magic words" are
12 required from the ALJ to reject a doctor's opinion; rather, this Court can infer the ALJ's
13 reasons for rejecting a doctor's opinion. *Magallanes v. Bowen*, 881 F.2d at 755.

14 The ALJ acknowledged Dr. McConnell's opinion (Tr. 27), but did not reject it
15 explicitly. However, a rejection of the notion that Plaintiff is limited to sedentary work
16 is implied in the ALJ's finding that Plaintiff can perform light work. (Tr. 34, Finding
17 No. 11.) The Court finds that the ALJ relied on substantial evidence in the record to
18 determine that Plaintiff could perform light work. The ALJ discussed Plaintiff's
19 physical limitations at length. (Tr. 30-31.) He noted that medical consultants from the
20 State Agency determined that Plaintiff was capable of performing light work. (Tr. 358.)
21 He also noted that examining orthopedic physician Dr. Alexis Falicov thought that
22 Plaintiff's arthritis and scarring may have given some stability to his left knee and that
23 the doctor did not recommend any type of reconstruction for that knee. (Tr. 460.)

1 Finally, the ALJ noted that Plaintiff walked, hiked (Tr. 464), and rode a bike (Tr. 619).²
2 The above evidence constitutes clear and convincing reasons cited by the ALJ to reject
3 Dr. McConnell's isolated finding that Plaintiff is limited to sedentary work. The Court
4 can infer that the ALJ found the above evidence more compelling without requiring the
5 ALJ to specifically state as much. Therefore, the ALJ did not err in rejecting Dr.
6 McConnell's opinion.

7 2. Dr. Bernardez-Fu

8 Plaintiff argues that the ALJ should have considered the opinion of Dr. Robert
9 Bernardez-Fu, a State Agency consultant, that Plaintiff should avoid concentrated
10 exposure to hazards such as machinery and heights. (Tr. 360.) Plaintiff asserts that the
11 ALJ should have considered this non-examining source as "other" opinion evidence as
12 required by 20 C.F.R. §§ 404.1527(f) and 416.927(f) because this limitation could affect
13 Plaintiff's ability to perform as a table worker. The Commissioner's brief does not
14 address this argument.

15 The record shows that the ALJ acknowledged Dr. Bernardez-Fu's assessment that
16 Plaintiff could perform light work subject to some postural limitations, but did not
17 address the doctor's finding that Plaintiff should avoid concentrated exposure to hazards.
18 (Tr. 27, 30, 358). The Commissioner is not required to discuss all evidence presented to
19 her. *See Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th Cir. 1984) (citing *Lewin v.*
20 *Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). However, Plaintiff has asserted that he is
21 unable to perform two of the three jobs identified by the ALJ and that the remaining
22 table worker job may require exposure to hazardous conditions. The undersigned

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24 ² Plaintiff testified that he no longer rides a bike; however, he did ride a bike for a few
25 months in 2001, after the onset of his alleged disability. (*Id.*)

1 concludes that further administrative proceedings are warranted to determine whether
2 avoidance of concentrated exposure to hazards should be incorporated into Plaintiff's
3 RFC, and if so, whether such a limitation would impinge on his ability to perform as a
4 table worker.

5 3. State Agency Medical Consultants

6 Plaintiff next argues that the ALJ improperly dismissed the opinions of Dr.
7 Robert Parker and Dr. Carla Hellekson, state agency medical consultants. The
8 Commissioner responds that the ALJ analyzed the doctors' opinions and found that the
9 examiners relied mostly on Plaintiff's subjective reports rather than objective medical
10 findings, and therefore accorded them little weight. (Tr. 30.)

11
12 Dr. Parker completed an assessment of Plaintiff in February of 2002 and
13 diagnosed Plaintiff as depressed with psychotic features and suffering from bipolar
14 disorder, personality disorder, and marijuana and alcohol dependence in fragile
15 remission. (Tr. 353.) Dr. Hellekson diagnosed Plaintiff with ADHD, bipolar disorder,
16 and antisocial personality disorder. (Tr. 488-92.) She also found that Plaintiff suffered
17 from moderate to severe limitations in cognitive and social functioning and from alcohol
18 abuse. (Tr. 500-03.)

19 The ALJ accepted the diagnoses of bipolar disorder, a history of substance abuse,
20 and personality disorder (Tr. 29), all of which he listed among Plaintiff's severe
21 impairments (Tr. 33, Finding No. 3). However, in evaluating Plaintiff's RFC, he
22 rejected findings from "some examining medical sources," presumably including Dr.
23 Parker and Dr. Hellekson, that Plaintiff was markedly limited in some factors of
24 cognitive and social functioning. (Tr. 30.) In so doing, the ALJ reasoned that these

1 sources relied on Plaintiff's "own reports that he was not abusing any substances." (*Id.*)
2 The ALJ's reasoning implies that these findings were not reliable because Plaintiff was
3 abusing drugs and alcohol. The ALJ went on to state that he accepted the opinion of
4 state agency consultant Dr. Reade, an opinion corroborated by Dr. Alexander Fisher,
5 that Plaintiff's ability to understand and remember is within the average range unless
6 impeded by the effects of drugs and alcohol. (*Id.*; Tr. 362-65.) The ALJ therefore
7 rejected medical opinions which he believed did not factor out alleged drug and alcohol
8 abuse ("DAA"), and accepted medical opinions which he believed did factor out DAA.

9 The Social Security Administration does not award disability benefits when DAA
10 is a contributing factor material to the determination of disability. 42 USC §§
11 423(d)(2)(c), 1382c(a)(3)(J); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998).
12 However, for the ALJ to rely on DAA to reject medical opinions is problematic because
13 DAA may only be factored out after a claimant has been found disabled. *Bustamante v.*
14 *Masannari*, 262 F.3d 949, 955 (9th Cir. 2001). "[A]n ALJ must first conduct the
15 five-step inquiry without separating out the impact of alcoholism or drug addiction." *Id.*
16 If an ALJ finds a claimant disabled, the ALJ should repeat the five-step sequential
17 evaluation process, discounting the effects of DAA, to determine whether the claimant
18 would still be found disabled absent DAA. *Id.*; 20 C.F.R. §§ 404.1535 and 416.935.

19 Here, the ALJ rejected Dr. Hellekson and Dr. Parker's opinions and accepted Dr.
20 Reade and Dr. Fisher's opinions based on his *premature* factoring-out of DAA rather
21 than on clear and convincing reasons supported by substantial evidence in the record.
22 *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993); *Winans v. Bowen*, 853 F.2d 643,
23 647 (9th Cir. 1987). Therefore, the undersigned concludes that the ALJ erred in
24 assessing Dr. Hellekson and Dr. Parker's opinions.

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2 4. Nurse Martin

3 Plaintiff asserts that the ALJ did not properly evaluate the opinion of Nurse
4 Nancy Martin, who evaluated Plaintiff. (Tr. 492-99.) The Commissioner responds that
5 the ALJ properly considered Nurse Martin's opinion but accorded it no significant
6 weight because it was not an acceptable medical source. (Tr. 32.)

7 Nurses are not acceptable medical sources under 20 C.F.R. §§ 404.1513(a) and
8 416.913(a), but evidence from other sources, including nurses, may be used to show the
9 severity of a claimant's impairments and how they affect a claimant's ability to work.
10 20 C.F.R. §§ 404.1513(d); 416.913(d). A nurse's opinion may be given less weight than
11 that of an acceptable medical source. *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir.
12 1996). An ALJ is free to reject or give less weight to an "other" source, but must give
13 reasons for doing so that are germane to the particular source. *See Dodrill v. Shalala*, 12
14 F.3d 915, 919 (9th Cir. 1993).

15 In May of 2004, Nurse Martin diagnosed Plaintiff with bipolar disorder,
16 polysubstance abuse in early full remission, traits of antisocial personality disorder, and
17 chronic pain due to arthritis of the bilateral knees. (Tr. 505.) In June of 2004, she filled
18 in a check-box form indicating that Plaintiff's mental impairments caused moderate to
19 severe limitations in several factors of cognitive and social functioning. (Tr. 494.)

20 As noted in Subsection A(3), the ALJ accepted Plaintiff's diagnoses of bipolar
21 disorder, a history of substance abuse, and personality disorder. (Tr. 29.) The ALJ need
22 not state reasons germane to Nurse Martin for rejecting portions of her opinion that are
23 duplicative of opinions from acceptable medical sources. The undersigned concludes,
24 however, that to the extent that Nurse Martin's opinion is unique, the ALJ has failed to

1 state reasons germane to Nurse Martin for rejecting it.

2 5. GAF Scores

3 Plaintiff argues that the ALJ improperly rejected his Global Assessment of
4 Functioning (“GAF”) scores, which ranged from 20 (Tr. 380) to 35 (Tr. 505) and 40 (Tr.
5 538). The Commissioner did not respond to this argument. Nonetheless, the ALJ need
6 not have addressed Plaintiff’s GAF scores separately from the treatment providers who
7 assigned them because GAF scores are not directly correlated with disability listings.
8 *See* 65 Fed. Reg. 50764-50765 (Aug. 21, 2000); *Vincent ex rel. v. Heckler*, 739 F.2d at
9 1394-95.

10 B. The ALJ’s Assessment of Plaintiff’s Credibility

11 The ALJ is responsible for determining credibility. *Andrews*, 53 F.3d at 1039.
12 An ALJ’s credibility determination must be based on clear and convincing reasons that
13 are supported by substantial evidence in the record. *See Morgan v. Comm’r of Social*
14 *Sec. Admin.*, 169 F.3d 595, 599-600 (9th Cir. 1999). In making a credibility
15 determination, the ALJ may consider at least the following factors: “[claimant’s]
16 reputation for truthfulness, inconsistencies either in [his] testimony or between [his]
17 testimony and [his] conduct, [claimant’s] daily activities, [his] work record, and
18 testimony from physicians and third parties concerning the nature, severity, and effect of
19 the symptoms of which [he] complains.” *Thomas v. Barnhart*, 278 F.3d 947, 958-59
20 (9th Cir. 2002) (internal quotations omitted).

21 1. Physical Limitations

22 Plaintiff asserts that the ALJ failed to provide specific reasons for rejecting
23 Plaintiff’s testimony that he is unable to: get out of bed two days each week because of
24 knee pain (Tr. 601), push or pull things without some pain (Tr. 606), and sit for longer

1 than 45 minutes without stretching his legs or for more than 30 minutes without
2 changing position (Tr. 604-05). The Commissioner responds that the ALJ was entitled
3 to find Plaintiff not credible based on his surly disposition in the administrative hearing
4 and on his activities. (Tr. 30-31.)

5 Contrary to Plaintiff's assertions, the ALJ found that Plaintiff's allegations
6 regarding his physical limitations were generally credible. (Tr. 30.) The ALJ
7 acknowledged Plaintiff's inability to walk for prolonged periods, his knee range of
8 motion difficulties, and limitations in pushing and pulling with his upper right arm. *Id.*
9 With regard to physical limitations which Plaintiff claims the ALJ did not specifically
10 address, for example, Plaintiff's alleged inability to get out of bed two days each week
11 on account of his knee pain, the ALJ cited Plaintiff's activities as suggesting that he was
12 not as limited as he alleged. The record reflects that Plaintiff went hiking and walking
13 (Tr. 464), although Plaintiff defined hiking as a half-hour walk (Tr. 615-16). Plaintiff
14 also biked. (Tr. 619-20.) Plaintiff quit biking after a few months, which he attributed to
15 his bike being stolen and to his being "kind of dangerous on a bike." (Tr. 619.) There is
16 no evidence that his hazardous riding was caused by his alleged disability. The activities
17 cited by the ALJ constitute substantial evidence supporting his finding that Plaintiff's
18 claims of more extreme physical limitations were not credible.

19 2. Mental Limitations

20 Plaintiff asserts that the ALJ did not provide adequate reasons for rejecting his
21 testimony that his mind raced and his memory was poor during manic phases (Tr. 611)
22 and that he had poor concentration (Tr. 616).³ The Commissioner responds that the ALJ

23 ³ The Court does not address Plaintiff's argument that the ALJ rejected Plaintiff's
24 testimony that he is unable to work effectively with coworkers and supervisors because the ALJ
25 provided for this limitation in Plaintiff's RFC. (Tr. 31.) It is of note that Plaintiff's problems with

1 was entitled to find Plaintiff not credible based on his non-compliance with prescribed
2 medical treatment and his inconsistent statements regarding his drug and alcohol abuse.
3 (Tr. 30-31.)

4 In evaluating the credibility of a claimant's testimony regarding his impairments,
5 an ALJ may consider "unexplained or inadequately explained failure to seek treatment or
6 to follow a prescribed course of treatment." *Smolen*, 80 F.3d at 1284 (emphasis added).
7 The record indicates that Plaintiff was difficult to engage and behaved inappropriately
8 during therapeutic efforts. (Tr. 287.) At one time he stopped taking medications or
9 going to his mental health clinic. (Tr. 428.)

10 Plaintiff argues that he stopped his medications because he was poor, homeless,
11 and depressed, and felt the medications were not helping him. He further asserts that his
12 medical noncompliance was consistent with behavior expected of a person suffering
13 from bipolar disorder. The record supports Plaintiff's arguments. He was homeless and
14 living in a tent in the woods during the period of alleged noncompliance. (*Id.*)
15 Additionally, Plaintiff's failure to follow prescribed treatment or engage in therapeutic
16 efforts are isolated points in the record, the bulk of which documents Plaintiff's visits to
17 care providers and following their treatment. The Court finds that Plaintiff has
18 adequately explained why he failed to follow medical treatment on occasion.

19 The Commissioner next argues that the ALJ found Plaintiff not credible based on
20 inconsistent statements regarding his drug and alcohol abuse. The record supports the
21 Commissioner's argument to a certain extent: for example, Plaintiff claimed to be clean
22 and sober to one doctor while at the same time reporting that he used marijuana
23 occasionally. (Tr. 489, 379.) However, in his opinion, the ALJ did not rely on

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25 his colleagues did not begin until 2000, after his alleged disability onset date. (Tr. 609.)

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1 inconsistent statements regarding DAA to find Plaintiff not credible. Rather, the ALJ
2 found Plaintiff not credible because DAA “plays a much larger role in (Plaintiff’s)
3 alleged limitations than he is willing to admit.” (Tr. 30.) In sum, the ALJ reasoned that
4 because he attributes many of Plaintiff’s alleged limitations to DAA, Plaintiff’s claimed
5 limitations are not credible (*Id.*) This reasoning again amounts to premature
6 factoring-out of the effects of DAA to find Plaintiff not as limited as he claims, and
7 perhaps as a consequence, not disabled. As discussed in Subsection (A)(3), an ALJ may
8 not factor out the effects of DAA unless he or she has first gone through the sequential
9 evaluation process and found a claimant disabled, after he or she repeats the sequential
10 evaluation process with the effects of DAA factored out. *Bustamante*, 262 F.3d at 955.

11 The ALJ’s credibility finding as to Plaintiff’s mental limitations was erroneous
12 because Plaintiff adequately explained his medical noncompliance and because the ALJ
13 prematurely factored DAA effects to dismiss some of Plaintiff’s limitations.

14 C. The ALJ’s Evaluation of Ralinda Morris’s Statements

15 Plaintiff argues that the ALJ did not provide germane or legitimate reasons for
16 rejecting the statements of Ralinda Morris, a friend of Plaintiff’s who filled out a
17 questionnaire indicating that Plaintiff is easily angered and frustrated, does not finish
18 projects he starts, and is forgetful. (Tr. 168-72.) The Commissioner responds that,
19 despite not providing reasons specific to Ms. Morris for rejecting her statements, the
20 Court can infer that the ALJ rejected Ms. Morris’s statements for the same reasons he
21 rejected Plaintiff’s statements because their statements were similar.

22 The Commissioner’s argument is not persuasive in light of the Court’s
23 determination that the ALJ failed to state clear and convincing reasons to reject
24 Plaintiff’s testimony. “[F]riends and family members in a position to observe a
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1 claimant's symptoms and daily activities are competent to testify as to (the claimant's)
2 condition...If the ALJ wishes to discount the testimony of the lay witnesses, he must give
3 reasons that are germane to each witness." *Dodrill*, 12 F.3d at 918-19. Under *Dodrill*,
4 this Court concludes that the ALJ erred in failing to give germane reasons for rejecting
5 lay witness testimony.

6 D. Step Five Analysis

7 Plaintiff argues that because the ALJ's RFC finding was erroneous, the
8 hypothetical he posed to the VE did not accurately reflect Plaintiff's limitations, and the
9 ALJ therefore did meet his burden at step five of showing that Plaintiff could work.
10 *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001). The Commissioner responds
11 that the ALJ's RFC finding was accurate and that he properly relied on a VE's testimony
12 to find Plaintiff not disabled. (Tr. 32.)

13 This Court need not evaluate this claim because Plaintiff's RFC may be adjusted
14 on remand, requiring the ALJ to engage in a step five analysis afresh.

15 VIII. CONCLUSION

16 The Commissioner's determination to deny Plaintiff benefits is not free of legal
17 error, nor is it supported by substantial evidence. Based on the record evidence, the
18 undersigned recommends that the Commissioner's decision be REVERSED and
19 REMANDED for further administrative proceedings. A proposed Order accompanies
20 this Report and Recommendation.

21 DATED this 27th day of October, 2006.

22 

23 MONICA J. BENTON
24 United States Magistrate Judge